

ADMINISTRATIVE

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6 JUN 1974

OGC Has Reviewed

MEMORANDUM FOR: Deputy Director for Management and Services

SUBJECT : Overtime and Premium Pay Policy

1. Action Requested: Change in overtime and premium pay policy and regulations to conform to the requirements of Federal Law.

2. Basic Data:

Federal Laws

Title 5 U.S. Code, Subchapter V establishes the basic requirements for overtime for general schedule employees. These are as follows:

Section 5542: Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work. (NOTE: The provision designating work in excess of 8 hours in a day as overtime was originally included in Federal Law in Public Law 89-504, 18 July 1966.)

Section 5543: Compensatory time off

(a) The head of an agency may

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(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work.

Section 5545: Annual premium pay

(c) the head of an agency, with the approval of the Civil Service Commission, may provide that

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regular scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than ten per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

(The Civil Service Commission has established the following rules for determining the amount of annual premium pay:

1. An average of at least three but not more than five hours per week of irregular or occasional overtime work - 10%.

2. An average of over five but not more than seven hours per week of irregular or occasional overtime work - 15%.

3. An average of over seven but not more than nine hours per week of irregular or occasional overtime work - 20%.

4. An average of over nine hours per week of irregular or occasional overtime work - 25%.)

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Fair Labor Standards Act Amendments of 1974  
(P.L. 93-259, April 8, 1974)

Effective May 1, 1974, except for certain employees in executive, administrative, and professional positions, and those in foreign areas, all Federal employees are entitled to overtime pay for all work which the employer "suffers or permits" to be done. The Civil Service Commission will issue a tentative list of the exempt employees by April 26. Most employees at GS-11 and below will be covered under this law.

The Civil Service Commission, as the enforcement agency, will be responsible for post audit of overtime pay administration to determine violations and order corrective action.

Agency Regulations

A. Overtime

The Agency regulations on overtime and annual premium pay follow the Federal Law in some respects. However, points of substantial difference are:

1. Employees, GS-12 through GS-14, may receive overtime payments or compensatory time in lieu thereof for directed overtime work in excess of 48 hours in a given work week.

2. No overtime payment or compensatory time will be granted for hours of duty between 40 and 48 in a given work week unless such hours represent directed work on,

a. a position which requires substantial amounts of overtime work on a continuing basis, the productivity of which is predominantly measurable in units of production or hours of duty performed;

b. on any day during a work period of seven or more consecutive days, or,

c. a second job, the duties of which are substantially unrelated to the primary assignment.

(The requirement that 8 hours of work be contributed without pay is inconsistent with the Federal Law and with good management principles.)

The Agency regulation also provides for the substitution of compensatory time in place of regular overtime either on the request of employees at GS-11 and below or by

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direction of the supervisor for employees in higher grades even though the Federal Law provides for such substitution only in the case of irregular or occasional overtime work.

The Agency regulation has never provided that overtime pay is required for all work in excess of eight hours in a day. There are a number of nonstandard work schedules in the Agency now utilizing 12 hour work days for which under Federal Law four hours of overtime pay are required for each 12 hour day. Other agencies which have tried similar schedules have been required to pay overtime. Compensatory time was not permitted.

The Agency overtime regulation has been in substantially the same form since March 1962. During this period the Agency regulation has required the normal sacrifice of eight hours of overtime compensation for employees at GS-12 through GS-14.

B. Annual Premium Pay

The provision of the Agency regulation covering annual premium pay is substantially the same as that established by the Federal Law.

Application of Agency Compensation Policy

Agency professional employees at GS-12 and above have been expected and encouraged to work overtime whenever they determined that such work was necessary or when directed, in nearly all cases without any form of compensation. Agency duty officers have worked in Headquarters offices on Saturday regularly for a dozen years or more without any form of compensation. The expressed view of many high officials has been that Agency professionals should be glad to perform such "discretionary" overtime without additional pay, since they are well compensated by their regular salaries. This view is in disregard of the fact that their regular salaries are based on a 40-hour week.

Agency officials having authority to approve such overtime have been aware that it was being performed and approved of it.

Failure to formally authorize or approve overtime where approving officials were aware of and agreed to performance has been held by the Court of Claims to require payment.

The Court of Claims in Anderson v. United States 136 Ct. Cl 365 (1956) makes the point that "The Commissioner of Customs, as the authorized deputy of the Secretary of the Treasury, had authority under the statute

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to order or approve overtime. While he did not order the work to be performed, he certainly knew and approved of its being done. . . . In withholding orders for the approval of overtime, the Commissioner intended to withhold compensation for services performed. . ." The Court directed payment to the employee.

The Court of Claims in Rapp v. United States, 340 F. 2d 635, 167 Ct. Cl 852 (1964) decided further "Where plaintiffs were not only induced to perform duty officer tours but were given reasonable and understandable grounds for fearing they might jeopardize their positions if they did not do so" they were entitled to compensation.

Many CIA professionals have performed Saturday duty tours without question and without overtime pay for many years for this reason. It seems clear that the fear of reprisal is a strong deterrent to employee claims for overtime.

With regard to annual premium pay, while the Agency regulation is substantially in agreement with the Federal Personnel Manual, we have deviated from the established percentage requirements for pay. In certain cases it was decided, for administrative reasons, to pay a lesser percentage rate than established. The legality of these actions is questionable.

#### Applicability of Federal Law to the CIA

The question as to whether the Federal Premium Pay law applies to the CIA has apparently never been ruled on by the Comptroller General or the Courts. The U.S. Code Title 5, Subchapter V on Premium Pay, however, provides for no exclusion of the Agency. While this may not be conclusive, it should be noted that Chapter 51, Title 5, on Classification of Positions, does provide for exclusion of the Agency. The absence of a specific exclusion for application of Premium Pay provisions to the Agency is evidence of intent that the Agency should be covered.

### 3. Staff Position

The provision of the Agency regulation limiting compensation for the first eight hours of overtime to employees at GS-12 through GS-14 predominantly in production jobs is prejudicial to the rights of employees in jobs not of a production nature who may be equally industrious and conscientious. Further, it is inconsistent with the annual premium pay provision which does not provide for ignoring the first eight hours of overtime.

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The primary reason for the Agency regulation may have been to discourage the use of excessive overtime but the result was to avoid payment for overtime while benefiting from the extra work performed. FOIAB5

The Congress now seems more concerned with employees' rights than it did many years ago. Employee organizations are more vociferous. Further, it is difficult to explain to employees why in the CIA one gives eight hours of free overtime to the Government which he is not required to do elsewhere. This cannot be justified on security grounds.

From the tone of decisions of the Court of Claims on the right of Federal employees to overtime compensation, it seems probable that any claim by an Agency employee supported by evidence of overtime work with tacit approval of officials would be decided in favor of the employee. Such a decision might require the Agency to compensate other employees so deprived of overtime compensation.

Therefore, consideration should be given to bringing all forms of Agency premium pay into line with the general Federal Law. Consideration should also be given to reviewing the extent to which employees who have not been compensated for overtime should be paid.

4. Recommendation:

a. That a committee be established in the Office of Personnel to review the overtime pay policies and regulations and revise to bring into agreement with the Federal Law.

b. That the committee determine practicable limitations to set on the authorization of overtime.

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c. That the committee consider and make recommendations as to the extent to which employees who have worked overtime without compensation under the present regulations should be compensated.

[Redacted]  
F. W. M. Janney  
Director of Personnel

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APPROVED

[Redacted]

11 June 1974  
Date

DISAPPROVED \_\_\_\_\_

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Date

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*\* Providing DGC concurs and agrees  
to assist in the study. Mfg*

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